A

PENGUASA JABATAN TANAH & SURVEI, BINTULU & ORS

v.

AMIT SALLEH & ORS

B

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
HASSAN LAH JCA
ABU SAMAH NORDIN JCA
C [CIVIL APPEAL NO: Q-01-61-2005]
28 APRIL 2008

NATIVE LAW AND CUSTOM: *Compensation and damages - Loss of Native Communal Reserve land by virtue of cessation order - Native*
D *customary rights extinguished - Whether compensation for loss of land per se and not for trees planted thereon - Whether trees planted pursuant to an illegal agreement - Whether planting of trees part of cultivation that should be compensated - Land Code (Sarawak), ss. 2, 5(2)(c), (3)(a), 8(b), 10(2)*

E ***WORDS & PHRASES:*** *"compensation" - Land Code (Sarawak), s. 5(3) - Interpretation - Whether a purposive approach*

The respondents were the natives of the Kedayan/Melanau/Malay communities in Sarawak. They occupied a piece of land ('the said
F land') of about 1223 hectares declared a Native Communal Reserve by the Native Communal (Agricultural) Reserve Order 1987 made pursuant to s. 6(1) of the Sarawak Land Code ('the Code'). The said land subsequently ceased to be a Native Communal Reserve by virtue of a Native Communal Reserve
G (Cessation) Order ('cessation order'). Following the cessation order, the respondents' native rights over the said land were extinguished by an extinguishment direction. The respondents were given another piece of land in place of the said land. It transpired that when the respondents were in occupation of the said land,
H they had entered into a joint venture agreement ('JV agreement') with a company called Bumisar Mewah Sdn Bhd to develop the said land for agricultural purposes. Under the JV agreement, the parties formed a joint venture company known as Bumisar Jaya Sdn Bhd ('Bumisar Jaya'). It was a term of the JV agreement that
I Bumisar Jaya would submit to the relevant authorities a proposal to plant oil palm and other crops on the said land. In addition,

the respondents were to apply to the authorities to convert the said land from a Native Communal Reserve to a Mixed Zone Land for a term of 60 years. In the interim period, the respondents planted teak and sentang trees ('the said trees') on the said land. The parties subsequently terminated the JV agreement but before the cessation order and the extinguishment direction came into force. The respondents then filed an action against the appellants primarily for compensation for the loss of the said trees. The High Court held the JV agreement was void on the ground that if the alienation of the said land to Bumisar Jaya, a non-native company, had gone through, that would contravene s. 8(b) of the Code. However, the learned judge held that the respondents were entitled to compensation for the loss of the said trees being things attached to the said land by virtue of s. 2 of the Code. Hence, the appellants' appeal.

Held (dismissing the appeal)
Per James Foong JCA delivering the judgment of the court:

(1) The JV agreement was a conditional agreement. It was conditional upon approvals from the authorities for the planting of oil palm and other agricultural products on the said land. Further, it was conditional upon the approval by the authorities for alienation and conversion of the said land into a Mixed Zone Land before it could be transferred to Bumisar Jaya. The JV agreement conferred no right or privilege on Bumisar Jaya to deal with the said land until those pre-conditions were met. When an agreement contains terms that require compliance with statutory provisions then such agreement cannot be void for illegality (see the Federal Court case of *Foo Say Lee v. Ooi Heng Wai* reaffirmed in *Haji Hamid Ariffin & Anor v. Ahmad Mahmud*). Based on the authorities, the learned judge had erred in concluding that the JV agreement was void for illegality. (paras 1, 19 & 20)

(2) There was no mention in the JV agreement of any arrangement or permission granted to Bumisar Jaya to plant the said trees on the said land until the prior approval of the authorities. In the absence there, the respondents could not be said to have contravened s. 8 of the Code by virtue of the JV agreement. (para 21)

(3) The evidence on record showed that the respondents planted the said trees through Bumisar Jaya. That implied that it was the respondents that had planted the said trees except that the actual act of planting them was carried out by Bumisar Jaya. Bumisar Jaya carried out that task for and on behalf of the respondents. The respondents were at all material times the principal and as principal they did not contravene any provision of the Code in cultivating the said trees. (para 22)

(4) Under s. 10(2) of the Code, no person except those exempted "may occupy" the said land and any person "in occupation thereof shall be deemed to be in unlawful occupation of State land". The appellants' argument that the act of planting the said trees which involved being in and out of the said land and as such constituting occupation of the said land, was a narrow, restrictive and unrealistic approach. If adopted it would cover virtually anyone entering the said land apart from the respondents and those they represent. It would even extend to essential service providers as in doctors and nurses who were required to stay over on the said land to treat the natives. That could not have been the intention of the legislature when they enacted s. 10(2) of the Code. (paras 24 & 25)

(5) *The Oxford English Dictionary Volume VII* states that the word "occupy" denotes "the taking of possession for one's use" or "to hold on to possession of something". No doubt the said trees were planted by Bumisar Jaya, a person not exempted under s. 10(2) of the Code to occupy the said land but by merely planting the said trees Bumisar Jaya was not taking possession of the said land. It did not intend to hold on to the said land. Bumisar jaya was just there to plant the said trees. There was no proof that Bumisar Jaya had unlawfully used and occupied the said land. (para 26)

(6) Section 5(3)(a) of the Code associates compensation with the extinguishment of native customary rights. As the respondents' customary rights over the said land were extinguished, they ought to be compensated. Cultivation on the said land was a customary right under s. 5(2)(c). Cultivation meant the planting of any form of crops in the soil that must include trees that could be harvested. The deprivation of those cultivated crops must be compensated when the extinguishment

direction came into effect. The word "compensation" in s. 5(3) must be given a purposive interpretation since the entire objective of the provision was to place in the hands of the owners expropriated the full money equivalent of the thing for which they had been deprived. Since the appellants deprived the respondents of their crops, the respondents must be compensated. (paras 30, 31 & 32)

(7) It was not unreasonable and unfair to pay the respondents for the said trees when the said trees were planted through their own efforts. The appellants did not put in any effort nor spent any money on the said trees and yet they would become the sole beneficiaries of those valuable said trees. In the face of such glaring inequality, the appellants should not be raising equitable principles when the scale of equity tilted against them. In any event as equity followed the law and the law depicted that the respondents should be compensated, the question of morality and public policy must make way for the law. (para 34)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden adalah anak-anak negeri dari suku-suku kaum Kedayan/Melanau/Malay di Sarawak. Mereka menduduki sebidang tanah ('tanah tersebut') seluas lebih kurang 1223 hektar yang diisytiharkan sebagai Rizab Kaum Anak Negeri oleh Perintah Rizab (Pertanian) Kaum Anak Negeri 1987 yang digubal di bawah s. 6(1) Kanun Tanah Sarawak ('Kanun'). Tanah tersebut kemudian tidak lagi menjadi tanah Rizab Kaum Anak Negeri berdasarkan Perintah (Penghentian) Rizab Kaum Anak Negeri ('perintah penghentian'). Ekoran perintah penghentian, hak anak negeri responden-responden ke atas tanah tersebut telah luput di bawah satu arahan peluputan. Namun begitu, sebagai ganti, responden-responden telah diberikan sebidang tanah lain. Bagaimanapun, apa yang berlaku ialah, sewaktu responden-responden menduduki tanah tersebut, mereka telah memeterai satu perjanjian usahasama ('perjanjian JV') dengan sebuah syarikat yang dipanggil Bumisar Mewah Sdn Bhd untuk membangunkan tanah tersebut sebagai tanah pertanian. Di bawah perjanjian JV, pihak-pihak telah menubuhkan sebuah syarikat usahasama dikenali sebagai Bumisar Jaya Sdn Bhd ('Bumisar Jaya'). Menjadi satu terma perjanjian JV bahawa Bumisar Jaya akan mengemukakan cadangan kepada pihak berkuasa relevan untuk menanam kelapa sawit dan lain-lain tanaman di tanah tersebut. Selain itu, responden-responden akan

memohon kepada pihak berkuasa untuk menukar tanah tersebut dari Rizab Kaum Anak Negeri kepada Tanah Zon Berbagai untuk tempoh 60 tahun. Sementara itu, responden-responden telah menanam pokok-pokok jati dan sentang ('pokok-pokok tersebut') di tanah tersebut. Pihak-pihak kemudian telah menamatkan perjanjian JV, tetapi sebelum perintah penghentian dan arahan peluputan mula berkuatkuasa. Responden-responden kemudian memfailkan tindakan terhadap perayu-perayu, secara pentingnya untuk mendapatkan gantirugi atas kehilangan pokok-pokok tersebut. Mahkamah Tinggi memutuskan bahawa perjanjian JV adalah batal atas alasan bahawa jika pemberianmilik tanah tersebut kepada Bumisar Jaya, yang bukan sebuah syarikat anak negeri, berjaya dilaksanakan, ianya akan melanggar s. 8(b) Kanun. Yang arif hakim, bagaimanapun, memutuskan bahawa responden-responden berhak kepada pampasan atas kehilangan pokok-pokok tersebut atas dasar bahawa pokok-pokok tersebut adalah benda-benda yang terlekat kepada tanah menurut s. 2 Kanun. Perayu-perayu telah merayu.

Diputuskan (menolak rayuan)
Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Perjanjian JV adalah satu perjanjian bersyarat. Ia tertakluk kepada pengesahan pihak berkuasa terhadap penanaman kelapa sawit dan lain-lain produk pertanian di tanah tersebut. Selain itu, ia juga bergantung kepada pengesahan pihak berkuasa bagi pemberianmilik serta penukarannya kepada Tanah Zon Berbagai sebelum ia boleh dipindahmilik kepada Bumisar Jaya. Perjanjian JV tidak memberi hak atau keistimewaan kepada Bumisar Jaya untuk berurusan dengan tanah selagi syarat-syarat ini tidak dipenuhi. Bilamana satu perjanjian mengandungi terma-terma yang mengkehendaki pematuhan kepada kehendak-kehendak statutori maka perjanjian sedemikian tidak boleh menjadi tak sah kerana illegality (lihat kes Mahkamah Persekutuan *Foo Say Lee v. Ooi Heng Wai* yang disahkan oleh *Haji Hamid Ariffin & Anor v. Ahmad Mahmud*). Berdasarkan autoriti, yang arif hakim khilaf dalam memutuskan bahawa perjanjian JV tak sah kerana illegality.

(2) Di dalam perjanjian JV, tidak disebut mengenai sebarang persetujuan atau kebenaran diberikan kepada Bumisar Jaya untuk menanam pokok-pokok tersebut di atas tanah tersebut kecuali dengan kebenaran terdahulu pihak berkuasa. Dalam

ketiadaan peruntukan tersebut, responden-responden tidak boleh dianggap sebagai telah melanggar s. 8 Kanun melalui perjanjian JV. A

(3) Keterangan pada rekod menunjukkan bahawa responden-responden telah menanam pokok-pokok tersebut melalui Bumisar Jaya. Ini bermakna ia ditanam oleh responden-responden. Cuma perbuatan menaman pokok-pokok tersebut dilakukan oleh Bumisar Jaya. Dalam ertikata lain, Bumisar Jaya melaksanakan kerja-kerja untuk dan bagi pihak responden-responden. Responden-responden adalah pada semua waktu material merupakan prinsipalnya dan selaku prinsipal mereka tidak melanggar mana-mana peruntukan Kanun apabila menanam pokok-pokok tersebut. B C

(4) Di bawah s. 10(2) Kanun, tiada siapapun kecuali mereka yang dikecualikan "boleh menduduki" tanah tersebut dan mana-mana orang yang "mendudukinya hendaklah dianggap sebagai menduduki Tanah Kerajaan secara haram". Hujah perayu-perayu bahawa perbuatan menanam pokok-pokok tersebut melibatkan keluar masuk ke tanah tersebut dan kerana itu merupakan pendudukan tanah tersebut, adalah satu pendekatan yang sempit, terhad dan tidak realistik. Hujah ini, jika diterima, boleh merangkumi sesiapa sahaja yang memasuki tanah tersebut selain dari responden dan wakil-wakil mereka. Ia malah akan merangkumi pengkhidmat-pengkhidmat seperti doktor dan jururawat yang perlu tinggal di tanah tersebut buat seketika untuk merawat suku-suku anak negeri di situ. Ini bukan niat badan perundangan apabila menggubal s. 10(2) Kanun. D E F

(5) *Kamus Oxford English* Jilid VII menyatakan bahawa perkataan "occupy" bermaksud "the taking of possession for one's use" atau "to hold on to possession of something". Tidak diragukan bahawa pokok-pokok tersebut ditanam oleh Bumisar Jaya, seorang yang tidak dikecualikan di bawah s. 10(2) Kanun untuk menduduki tanah tersebut. Dengan hanya menanam pokok-pokok tersebut Bumisar Jaya pastinya tidak mengambil milikan tanah tersebut. Ia tidak berniat untuk menetap di tanah tersebut dan hanya berada di situ untuk menanam pokok-pokok tersebut. Maka tiada bukti bahawa Bumisar Jaya telah menyalahguna atau telah menduduki tanah tersebut. G H I

(6) Seksyen 5(3)(a) Kanun menghubungkan pampasan dengan peluputan hak adat anak negeri. Oleh kerana hak adat responden-responden ke atas tanah tersebut telah luput, maka mereka seharusnyalah dipampasi. Bercucuk tanam di atas tanah tersebut adalah satu hak adat di bawah s. 5(2)(c). Bercucuk tanam bermaksud menanam apa jua jenis tanaman di tanah termasuklah pokok-pokok yang boleh dituai. Pengeluaran arahan peluputan telah menyangkal responden-responden kepada tanaman-tananam tersebut dan mereka hendaklah dipampasi. Perkataan "compensation" di s. 5(3) hendaklah diberikan maksud purposif kerana keseluruhan objektif peruntukan tersebut adalah untuk membuat pembayaran wang yang secukupnya kepada pemilik-pemilik atas kehilangan yang ditanggung oleh mereka. Oleh kerana perayu-perayu telah menyebabkan responden-responden kehilangan tanaman-tanaman mereka, maka responden-responden perlulah dipampasi.

(7) Membayar pampasan kepada responden-responden atas pokok-pokok tersebut yang ditanam melalui usaha-usaha mereka sendiri bukan sesuatu yang tidak munasabah atau tidak adil. Perayu-perayu tidak menyumbang sebarang usaha dan tidak membelanjakan apa-apa ongkos ke atas pokok-pokok tersebut tetapi mereka akan menjadi penerima manfaat tunggal pokok-pokok berharga tinggi tersebut. Dalam keadaan tidak berekuiti yang ketara tersebut, perayu-perayu tidak harus dibenarkan membangkitkan prinsip-prinsip ekuiti kerana neraca ekuiti tidak memihak kepada mereka. Apapun, oleh kerana ekuiti menuruti undang-undang dan undang-undang menunjukkan bahawa responden-responden perlu dipampasi, persoalan moral dan kepentingan awam harus tunduk kepada undang-undang.

Case(s) referred to:

Foo Say Lee v. Ooi Heng Wai [1968] 1 LNS 38 FC ***(foll)***

Hj Hamid Ariffin & Anor v. Ahmad Mahmud [1976] 2 MLJ 79 FC ***(foll)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Legislation referred to:

Land Code (Sarawak), ss. 2, 5(2)(c), (3)(a), 6(1), 8(b), 10(2), 209

Rules of the High Court 1980, O. 14A

For the appellants - Thomas Akin Jelimin, Senior State Legal Officer (Kezia Norella Daim with him); State AG's Chambers Sarawak
For the respondents - MS Sandhu (John Antau & Musa Dinggat with him); M/s Tang & Antau Co

[Appeal from High Court, Bintulu; Suit No: 22-21-2000 (BTU)]

Reported by Usha Thiagarajah

JUDGMENT

James Foong JCA:

Introduction

[1] This is an appeal against the decision of the High Court of Sabah & Sarawak at Bintulu which answered two questions framed by the said court in the affirmative followed by issuing an order that the appellants pay damages to be assessed to the respondents.

Background

[2] The respondents are natives of the Kedayan/Melanau/Malay communities of Kuala Nyalau & Ulu Nyalau, Suai (communities). By a Native Communal (Agriculture) Reserve Order 1987 ("Native Communal Reserve Order"), made pursuant to s. 6(1) of the Sarawak Land Code (Land Code), the land they occupied known as Lot 3, Block 52, Kemena Land District ("said land"), consisting of approximately 1223 hectares was declared a Native Communal Reserve for the exclusive use by their communities for agricultural purpose. The said land however ceased to be a Native Communal Reserve in 1999, when a Native Communal Reserve (Cessation) Order ("Cessation Order") was issued on 7 December 1998. Following the Cessation Order, the respondents' native rights over the said land were extinguished by a Land Extinguishment of Native Customary Rights (Similajau Area), (No. 106) Direction, 1998 ("Extinguishment Direction"). To replace the said land, the respondents were given another piece of land known as Lot 2, Block 51, Kemena Land District (Lot 2). However, while they were in lawful occupation of the said land, the respondents had on 16 September 1994, entered into a joint venture agreement

("the JV Agreement") with a company known as Bumisar Mewah Sdn Bhd ("Bumisar") to develop the said land for agricultural purposes. Under the terms of the JV Agreement, the respondents and Bumisar were to form a joint venture company known as Bumisar Jaya Sdn Bhd ("Bumisar Jaya"), and in this company the respondents were to be issued with 25% of the shares whilst Bumisar were to get 75%. It was a term of the JV Agreement that Bumisar Jaya would submit to the relevant authorities a proposal to plant oil palm and other crops on the said land. In addition, the respondents were to apply to the authorities to convert "the said land from Native Communal Reserve to a Mixed Zone Land for a term of at least sixty (60) years". Pending all these, the respondents, through Bumisar Jaya, planted teak and sentang trees on the said land. According to the respondents there are now (a) 713,390 teak trees; (b) 3697 sentang trees and; (c) 11,000 teak seedlings (all collectively known as "the said trees"). By the end of 1998, the teak and sentang trees were about 40 feet tall with a girth of up to 24 inches; all ready to be harvested. Their value, according to the respondents, is RM101,932,180.

[3] On 16 March 1997, by mutual agreement, the JV Agreement was terminated by the parties. This was before the coming into force of the Cessation Order and the Extinguishment Direction.

[4] Deprived of their native rights over the said land due to the Cessation Order and the Extinguishment Direction, the respondents filed this claim against the appellants seeking:

(a) special damages of RM110,493,180 which is made up of RM101,932,180 for the loss of the trees and seedlings and RM8,561,000 for deprivation of their customary rights and native customary land;

(b) general damages;

(c) alternatively for compensation for losses due to the deprivation of their rights, particularly in having to abandon the said trees cultivated on the said land;

(d) interest and costs.

[5] After the close of pleadings, the respondents filed a summons in chambers under O. 14A of the Rules of High Court 1980 (RHC) requesting the High Court to answer several

questions which answers will dispose of the case. From the original five questions, the High Court narrowed down to two and rephrased them as follows:

1. Did the respondents acquire native customary rights over the said land by virtue of the Native Communal Reserve Order?

2. If the answer to the first question is in the affirmative, are the respondents entitled to be compensated for the crops (including the trees of commercial value) planted on the said land under the JV Agreement with a non-native company when the native customary rights were extinguished by the Extinguishment Direction?

Answer To The 1st Question

[6] To the first question, the learned High Court judge answered it in the affirmative stating:

> In my opinion the concession by the learned state legal officer Susan Gau that the plaintiffs are natives covered by the 1987 Order renders the question (of) whether the plaintiffs (are) the natives (of the) community under that Order as a non issue.

[7] This concession referred to concerns a preliminary point raised by the trial judge as to "whether the defendants still stand by their denial that the plaintiffs are not natives belonging to the Kedayan/Melanau/Malay communities of Kuala Nyalau and that they do not have customary rights over the said land". To this, "the learned state legal officer conceded that for the purpose of the present application the plaintiffs are natives covered by the 1987 Order".

[8] As the appellants did not challenge the answer to this first question, it must be implied that they have accepted the answer of the High Court as correct, ie, the respondents had acquired native customary rights over the said land by virtue of the Native Communal Reserve Order.

Answer to the 2nd question

[9] The High Court answered the 2nd question also in the affirmative. The reasons provided are observed in the following passages of the judgment:

A Is the joint venture agreement (a) void agreement under section 24 of the Contracts Act 1950? The joint venture agreement was between the plaintiffs and BMSB (Bumisar) who was non-native. The objective of the joint venture agreement was to develop Lot 3 on joint venture basis ... . At this point it is to be observed
B that there is nothing in the Code or in any other written law that I am aware of that prohibits the natives to enter into joint venture agreement and formed *(sic)* a joint venture company with a non-native. However the question as to the legality of the joint venture company in this case must also take into consideration the provision of section 8(b) of the Code. Under this section an
C agreement is deemed to have been entered into for illegal consideration if it transfers or confers any rights or privileges over native area land, native customary land or interior area land to non-native; or which would result in such person enjoying any such right or privilege ... . If the alienation of the land to the joint
D venture company had gone through, the land would be practically transferred to a non-native. To my mind such provisions as to the alienation of the land to the joint venture company is clearly offensive to section 8(b) SLC (Code) ... . Thus I conclude that the joint venture agreement is null and void.

E Having found the joint venture agreement between the Development Committee, that represented the plaintiffs, and the BMSB is void, can the plaintiffs recover damages or be compensated for the loss suffered due to the destruction of the crops on their land particularly the commercially valuable setangs and teaks? Learned counsel for the plaintiffs submitted that they
F could ... Learned SLO (State Legal Officer) disagrees with the submissions by learned counsel for the plaintiffs. She advanced two reasons: Firstly, under section 8(b) of the Code any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any
G person claiming that any consideration promised has not be *(sic)* paid or furnished. Secondly, the joint venture agreement being an illegality, the right to the trees planted on Lot 3, the said land, cannot 'devolve' from non-natives to the natives ... The trees formed part of the land and the land remained as native communal reserve after the rescission of the joint venture
H agreement. Therefore when the reserve is extinguish *(sic)* the natives are entitled to be compensated for the lost *(sic)* of their communal reserve as well as for their crops. Furthermore the rescission of the joint venture agreement took place long before the extinguishment of the reserve by the defendants. Thus at the
I time when the defendants gazetted the 1999 Order the communal reserve was not subject to any joint venture agreement between the natives and non-natives. The reserve wholly belonged to the natives then.

[10] To summarize, the approach of the High Court is this: A

1. Though the JV Agreement is void for illegality, the respondents are not attempting to recover the consideration made therein.

2. The said trees are things attached to the said land by virtue of s. 2 of the Code which declares that "land" includes things attached to earth or permanently fastened to anything attached to the earth. B

3. "Therefore, when the reserve is extinguish *(sic)* the natives are entitled to be compensated for the lost *(sic)* of the communal reserve as well as for the crops", especially so when the JV Agreement had been terminated and was no longer operative. C

[11] Though accepting the ruling of the High Court on the JV Agreement being void for illegality, the appellants however argued as follows: D

1. Bumisar Jaya, not being and incapable of being a native within the definition of the Code, were allowed to enter into the said land to plant the said trees. This is in contravention of s. 10(2) of the Code which says: E

   No person whether a native or non-native may occupy any Native Customary Land or any Reserved Land save under and in accordance with the conditions applicable thereto by virtue of this or any other written law, and any person in occupation thereof shall be deemed to be in unlawful occupation of State Land and section 209 shall apply thereto. F

2. Since the said trees were planted "through unlawful use and occupation of the said land (which is always State land) and pursuant to an illegal agreement which has been declared null and void", then the respondents should not reap the benefits sowed by seeds of inequity. For support, the appellants cited the case of *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577 where it says at pp. 581-582: G H

   > Encik Ahmadi, the learned legal advisor, had argued that the warehouse, in the admitted absence of planning permission, was illegally located on the subject property. The respondent, he argues, ought not to benefit from his own wrong. He has I

A further submitted that para. 1(3)(b) of the First Schedule when properly interpreted excludes from consideration a building built unlawfully upon land that is being acquired. I am in full agreement with his submission.

B Quite apart from the construction of para. 1(3)(b) of the First Schedule, there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as C follows: a party ought not to be permitted to take advantage of his own breach. See *Alghussein Establishment v. Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1.

D But as I have said, the principle is of universal application. In the context of the present case, that principle produces the following result. A land owner who has erected a building on his land contrary to law ought not to receive any benefit from it from an acquiring authority under the Act.

E 3. Compensation for the extinguishment of the native customary rights is only for the land *per se*, not for the said trees planted thereon. Nonetheless, the respondents had been duly compensated with the replacement Lot 2.

4. "Hence it is unfair, unreasonable, morally wrong and against F public policy, for the High Court to order the appellants to compensate the respondents for the trees which (a) formed part of the State land, and (b) were planted thereon by a non-native in contravention of the express purpose for which the Native Communal Reserve was created, ie, for the G exclusive use of the native, and no non-native may be permitted to use or occupy the land for the planting of the teak and sentang trees".

[12] I shall consider each of these contentions in turn.

H **1st Contention: The Respondents Should Not Be Entitled To Benefit From Their Own Wrong**

[13] This first contention of the appellants touches on two factors: (a) the said trees were planted through unlawful use and I occupation of the said land; and (b) the said trees were planted pursuant to an illegal agreement. As the High Court was of the opinion that the JV Agreement is void for illegality, I shall deal with this 2nd factor first.

Were The Said Trees Planted Pursuant To An Illegal Agreement?

[14] To ascertain this, I ask the following questions: (a) is the agreement illegal; and (b) were the trees planted pursuant to this agreement?

Is The JV Agreement Illegal?

[15] In order to answer this, one must examine the contents of the JV Agreement against the provision of the law alleged to be contravened.

[16] The recital and the operative part of the JV Agreement reveal that the objective of the parties was to enter into a business venture by setting up Bumisar Jaya to develop the said land for agricultural purposes. The shares holdings in this joint venture company were in the proportion as disclosed. Under cl. 2 of this agreement, Bumisar Jaya was to apply to the authorities concerned "for plantation of oil palms and for other agricultural purposes and shall commence and proceed with the plantation works on approval of the said Proposals". And in cl. 3, it is stipulated that "The Development Committee (respondents) shall apply to the authorities csoncerned for the alienation or transfer of the said land to, the Joint Venture Company (Bumisar Jaya Sdn Bhd) and for conversion of the said land from Native Communal Reserve into Mixed Zone Land for a term of at least sixty (60) years".

[17] It is alleged that by these terms, the parties had contravened s. 8(b) of the Code which declares:

> S. 8 Save as provided in section 9:
>
> (a) a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land;
>
> (b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration; and, in particular but without prejudice to paragraph (d), any consideration which shall have been paid or furnished shall not be recoverable in any

court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished;

(c) any person purporting to enter into an agreement to which paragraph (b) applies shall be guilty of an offence ...;

(d) in any case in which a person is convicted of an offence under paragraph (b), the court may, if there is reason to believe that such person did not appreciate he was contravening paragraph (a) ...;

(e) subject as aforesaid and to any remedy for the recovery of any fine imposed, the rights and privileges of any native shall not be adversely affected by any agreement to which paragraph (b) applies.

[18] Having examined these principal terms of the JV Agreement, I am of the opinion that they do not contravene this provision of the Code. The reason is simply this: the JV Agreement was a conditional agreement. It was conditional upon approvals from the authorities for the planting of oil palm and other agricultural products on the said land. Further, it was conditional upon the approval by the authorities for alienation and conversion the said land into a Mixed Zone Land before it could be transferred to Bumisar Jaya. This agreement conferred no right or privilege on Bumisar Jaya to deal with the said land until these pre-conditions were met. When an agreement contains terms that require compliance with statutory provisions then such agreement cannot be void for illegality. The Federal Court case of *Foo Say Lee v. Ooi Heng Wai* [1968] 1 LNS 38 supports this. There, the plaintiff had entered into an agreement with the defendant to purchase the defendant's Malay Reserve land in Kelantan. The agreement stipulates that the sale is subject to the approval of the Kelantan State Government and Ruler in Council. In declaring the agreement is not null and void for illegality the Federal Court said:

> If you read section 12(i) carefully, it will be apparent that only attempts to deal in Reservation land contrary to the provisions of the Enactment would be null and void so that though the agreement between the two parties could be regarded as an attempt to deal in reservation land it is not in my view, an attempt to deal in the land contrary to the provisions of the Enactment.

[19] This approach was reaffirmed by the Federal Court in *Haji Hamid bin Ariffin & Anor v. Ahmad bin Mahmud* [1976] 2 MLJ 79 where Suffian LP observed;

> Be it noted that the purported sale here was an "outright" sale. I would be inclined to consider it valid if it had been conditional and expressed to be subject to the State Authority (1) allowing the land to be exercised under section 4 or (2) agreeing to declare the Siamese lady a Malay for the purposes of the Enactment under section 19, for such an agreement of sale does not purport to vest in a non-Malay right or interest in Malay Reservation land and is not "contrary to the provisions of subsection (1) of section 6"; *vide Foo Say Lee v. Ooi Heng Wai*".

[20] Based on these authorities, I am of the view that the learned trial judge has erred in concluding that the JV Agreement is void for illegality.

Were The Said Trees Planted Pursuant To The JV Agreement?

[21] Even if the JV Agreement was valid what about the said trees planted on the said land for the purpose of compensation? To answer this, I return to the terms of the JV Agreement. There is no mention in this deed of any arrangement or permission granted to Bumisar Jaya by the respondents to plant the said trees on the said land until the prior approval of the authorities. In the absence of this, the respondents cannot be said to have contravened s. 8 of the Code by virtue of the agreement.

Who Planted The Said Trees?

[22] Since the JV Agreement makes no provision for the planting of the said trees until permission is obtained, then who planted these trees? For this, I turn to the evidence. What is recorded is that "the plaintiff planted the said trees through Bumisar Jaya". In my view, this statement implies that it was the respondents who planted the said trees except that the actual act of planting was carried out by Bumisar Jaya. Bumisar Jaya carried out this task for and on behalf of the respondents. The respondents were at all material time the principal and as principal they did not contravene any provision of the Code in cultivating the said trees.

Were The Said Trees Planted Through Unlawful Use And Occupation Of The Said Land?

[23] Perhaps in anticipation of the abovementioned approach, the appellants now argue before us that the said trees were planted through unlawful use and occupation of the said land. They said that the "joint venture company must have occupied the land in the process of planting the trees, as no one could have planted these trees without going onto and staying on or occupying the land having regard to the huge number of trees allegedly planted as deposed in the affidavit of learned counsel for the respondents".

[24] When the appellants presented this argument they must had in mind s. 10(2) of the Code. Under this provision of the law, no person except those exempted "may occupy" the said land and any person "in occupation thereof shall be deemed to be in unlawful occupation of State land". But was the planting of the said trees by Bumisar Jaya considered occupying the said land? The appellants argued that since this act of planting involved being in and on the said land it would definitely constitute occupying the said land.

[25] In my view, this is a narrow, restrictive and unrealistic approach. If adopted it would cover virtually anyone entering the said land apart from the respondents and those they represent. It would even extend to essential service providers who are required to stay over on the said land. This would include doctors and nurses who had to stay over on the said land for a number of days to treat the natives. If one were to construe s. 10(2) of the Code the way the appellant encouraged us to, then all these personnel would have breached s. 10(2) and liable to be punished under s. 209 of the Code. When this happens, the respondents would be forced into isolation as no one apart from the natives living there would risk entering the said land to provide assistance for fear of prosecution. Certainly this could not have been the intention of the legislature when they enacted s. 10(2) of the Code.

[26] According to the Oxford English Dictionary, volume VII, the word "occupy" denotes "the taking of possession for one's use" or "to hold on to possession of something". No doubt the said trees were planted by Bumisar Jaya, a person not exempted under s. 10(2) of the Code to occupy the said land, but by merely

planting the said trees thereon Bumisar Jaya was not taking possession of the said land for it did not intent to hold onto the said land. Bumisar Jaya was just there to plant the said trees. Without these essential elements satisfied, there is no proof that Bumisar Jaya had unlawfully used and occupied the said land.

[27] Since the respondent had committed none of the alleged wrongs, I conclude by saying that the principle of antiquity where a person should not benefit from his own wrong is inappropriate for application in this instant case.

2nd Contention: Compensation For Loss Of Land Per se

[28] In this 2nd contention, the appellants argued that the respondents should not be compensated since they were given a piece of replacement land. Compensation, according to the appellants, is only for the land *per se* and not for the trees planted thereon.

[29] When this same issue was raised in the High Court, it was dismissed in this manner:

> Setang and teak are commercially valuable trees ... . They planted them with a view of harvesting them when they reached maturity and sell them as the produce of the land to earn income from the land. Therefore in my view it would *(sic)* reasonable to treat the value of the land and that of the trees as a separate item of value for the purpose of determining the compensation payable to the plaintiffs following the extinguishment of their native communal reserve. It will be observed that the proviso to subsection (3) of section 5 of the Code seems to make this approach possible. The proviso speaks about paying compensation 'with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise'. The use of the words 'additional compensation', and 'or otherwise' in the proviso in my opinion removes any doubt that one may have as to the range of compensation that may (be) payable to the natives whose customary rights have been extinguished. In my view it is reasonable to conclude that this would include compensating the natives for the loss suffered when their crops on the land, which they have grown for their income, are destroyed. The setangs and the teaks are, in this instant case, is *(sic)* in this category ... .
>
> The trees formed part of the land and the land remained as native communal reserve after the rescission of the joint venture agreement. Therefore when the reserve is extinguish *(sic)* the natives are entitled to be compensated for the lost *(sic)* of their communal reserve as well as their *(sic)* for their crops.

[30] There is much force in this approach but I would prefer another way of looking at it. The provision for compensation in the event of extinguishment of a customary right over native land is s. 5(3)(a) of the Code which says:

> Any native customary rights may be extinguished by direction issued by the Minister ...
>
> Provided that where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

[31] This particular section associates compensation with the extinguishment of native customary rights. Because the respondents' customary rights over the said land were extinguished, they ought to be compensated. When this is the objective of the law, then it is pertinent to ascertain what were the respondents' rights on the said land. The answer may be found in s. 5 of the Code which says:

> (1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area Land ...
>
> (2) The methods by which native customary rights may be acquired are:
>
> (a) the felling of virgin jungle and the occupation of the land thereby cleared;
>
> (b) the planting of land with fruit trees;
>
> (c) the occupation or cultivation of land;
>
> (d) the use of land for a burial ground or shrine;
>
> (e) the use of land of any class for rights of way; or
>
> (f) any other lawful method ...

[32] As cultivation on the said land is a customary right under s. 5(2)(c) of the Code, and cultivation means the planting of any form of crops in the soil which, in my opinion, must include trees that can be harvested, then deprivation of these cultivated crops must be compensated when the Extinguishment Direction came into effect. The word 'compensation' in s. 5(3) of the Code must be given a purposive interpretation since the entire objective of this provision is to place in the hands of the owners expropriated the full money equivalent of the thing for which they have been deprived. Since the respondents were deprived of their crops by the appellants, the appellants must compensate them for such deprivation.

[33] For these reasons, this 2nd contention of the appellants is unsustainable.

3rd Contention: Unfair, Unreasonable, Morally Wrong And Against Public Policy To Compensate The Respondents For The Said Trees

[34] This final contention of the appellants touches on morality and public policy. It is strange that the appellants considered it unreasonable and unfair to pay the respondents for the said trees when they were planted through the efforts of the respondents. On the contrary, if compensation is not paid for the said trees, the appellants would be the sole beneficiaries of these valuable trees without having, put in any effort nor spending a single sen for them. In the face of such glaring inequality, I am indeed surprised to find the appellants raising equitable principles when the scale of equity tilts against them. In any event, as equity follows the law and the law depicts that the respondents should be compensated, the question of morality and public policy must make way for the law.

Conclusion

[35] In conclusion, for reasons as stated, the appeal should be dismissed with costs and that the deposit for this appeal be paid to the respondents towards the account of taxed costs.

[36] My brothers Justice Hasan Lah and Justice Abu Samah Nordin have read this judgment in draft and concurred with the contents therein.